

No. 2473

IN THE

# United States Circuit Court of Appeals

For the Ninth Circuit

UNION STEAMSHIP COMPANY (a corporation), claimant of the American Steamship "Argyll", her engines, boilers, etc.,

*Appellant,*

vs.

KONSTANT LATZ,

*Appellee.*

And Causes No. 2474 and 2516, All Consolidated for Hearing.

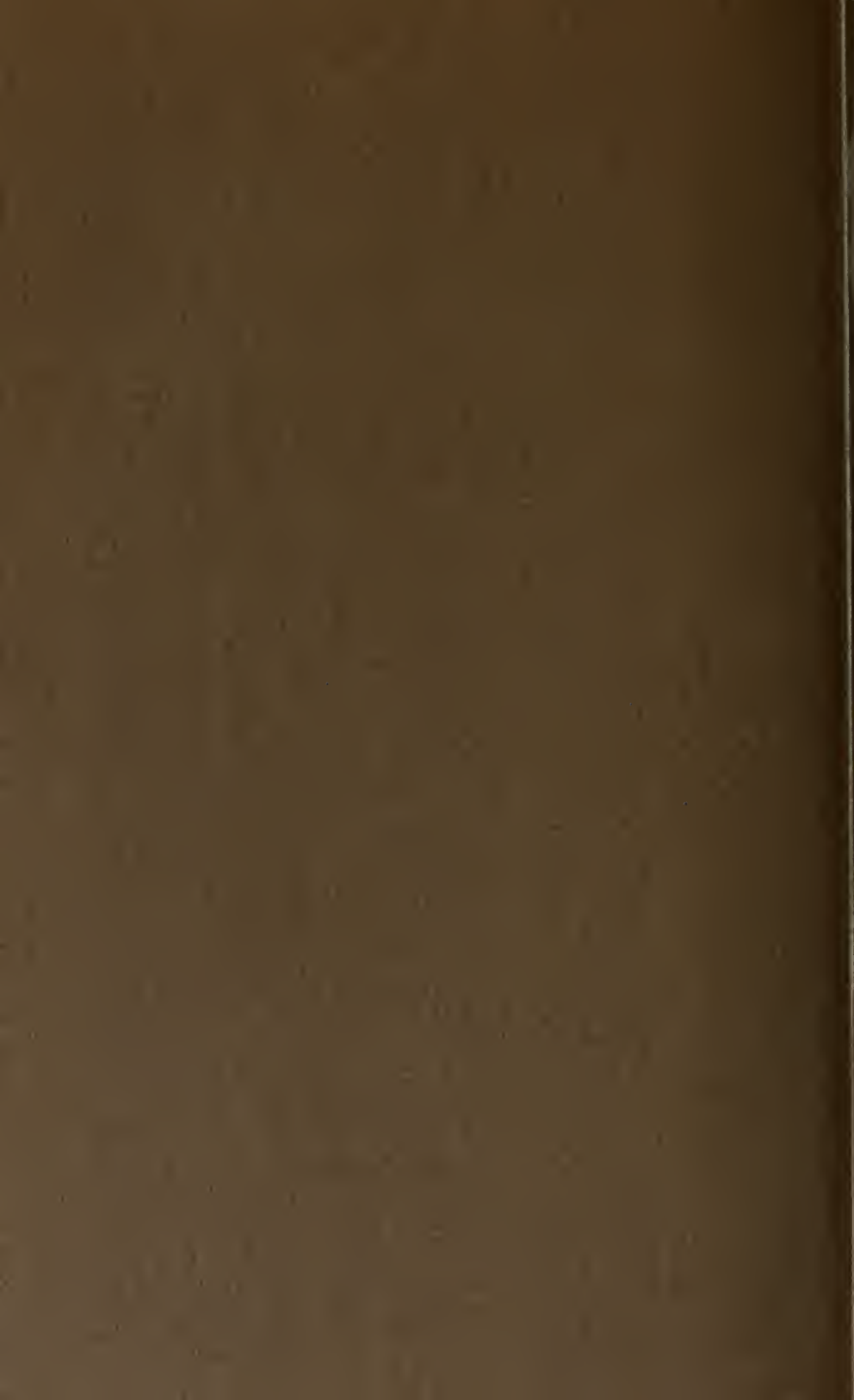
## APPELLANT'S PETITION FOR A REHEARING.

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By F. D. Monckton Deputy Clerk.



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*Appellant,*

vs.

KONSTANT LATZ,

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No. 2473

UNION STEAMSHIP COMPANY,  
(a corporation), etc.,

*Appellant,*

vs.

ASLAK ABRAHAMSON,

*Appellee.*

No. 2474

UNION STEAMSHIP COMPANY  
(a corporation), etc.,

*Appellant,*

vs.

GUALALA STEAMSHIP COMPANY  
(a corporation),

*Appellee.*

Consolidated for Hearing.

No. 2516

**APPELLANT'S PETITION FOR  
A REHEARING.**

*To the Honorable William B. Gilbert, Presiding Judge,  
and the Associate Judges of the United States Cir-  
cuit Court of Appeals for the Ninth Circuit:*

The Union Steamship Company, appellant and petitioner herein, respectfully requests a rehearing in the above causes.

This petition is not interposed for delay. It is presented because we sincerely believe that such manifest errors appear in the opinion of the court in holding the "Argyll" alone at fault as to merit a rehearing. Accordingly, we most respectfully point out that the court erred in holding:

1. *That the only controverted question was whether the primary and causative fault lay with the "Argyll";*
2. *In not, at least, holding that the "Gualala" was guilty of contributory fault in the particulars hereinafter specified.*

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## I.

### The "Gualala's" Fault Was Controverted.

In its opinion, this court said:

"The Gualala is perhaps subject to criticism that she did not sooner stop and reverse, but the primary and causative fault lies with the Argyll, for which she is alone liable. *This being the only controverted question, the decrees in all the cases are affirmed.*" (Italics ours.)

The hearing in this court was, by the settled rule, a trial *de novo*. This was so held by Circuit Judge Ross, speaking for this court, in

*The San Rafael*, 141 Fed. 270, 275,

wherein he said:

"It is well settled, said the Supreme Court in *Irvine v. The Hesper*, 122 U. S. 256, 266, 7 Sup. Ct. 1177, 30 L. ed. 1175, 'that an appeal in admiralty from the District Court to the Circuit Court vacates altogether the decree of the District Court, and that the case is tried *de novo* in the Circuit Court.'

\* \* \* The same rule applies here, since this Court now has the jurisdiction of appeals in admiralty from the District Court that formerly appertained to the Circuit Court. *The Sirius*, 54 Fed. 188, 194, 4 C. C. A. 273. The whole of the cases in hand, therefore, were opened by the appeals taken by petitioner and claimants."

*Reid v. Fargo et al.*, 213 Fed. 771.

Appellant specifically pointed out and discussed in its brief and on the oral argument the errors in the navigation of the "Gualala". We frankly cannot, therefore, understand how this court could have been led into the error of holding that the only controverted question was the fault of the "Argyll".

It is true that Mr. Wall in his brief questioned the sufficiency of appellant's assignment of errors, but on the oral argument we called this to the court's attention, stating that we understood the rule of practice to be that a trial *de novo* was had in admiralty in this court, and requesting, if the court was of the opinion that the point was well taken and the assignments were insufficient to raise in question the fault of the "Gualala",

that appellant might have an opportunity to file amended and supplementary assignments for that purpose. To this request the presiding judge assented, but no suggestion has been made in any form by the court that the assignments were insufficient to admit of a full consideration of the conduct of both vessels leading to the collision. If, perchance, this be the ground for the court now holding that the fault of the "Argyll" was the only controverted question, we beg the privilege of filing the required assignments of errors, as we understood the presiding judge to consent to, in order that this court may pass upon what we believe are manifest and indisputable faults on the part of the "Gualala" even granting that the collision happened as the court has held that it did occur.

The faults are so clear from the facts of the collision as reviewed by the court in its opinion that we urge upon the court their consideration, and a rehearing to that end.

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## II.

### **The Contributory Fault of the "Gualala".**

#### **A. THE "GUALALA'S" LOOKOUT WAS NEGLIGENT IN NOT OBSERVING AND REPORTING THE APPEARANCE OF THE "ARGYLL'S" GREEN LIGHT.**

On the court's own version of the collision, the inefficiency of the "Gualala's" lookout is so clear that doubt of it cannot exist. The court finds:

"The Argyll was heading, when first sighted, almost in a direct course for the Gualala. As the Gualala continued to starboard, the Argyll changed

to port, as she was directed to do, and probably swung further in that direction than the officer on the bridge was aware of."

It is undisputed by the parties litigant, and this court does not find to the contrary, that the vessels came together at about thirty degrees from ahead. The lookout of the "Gualala" described it as follows:

"Q. *Do you know at about what sort of an angle she struck?*

A. *Well, about right ahead like, pretty near ahead.*" (Ap. 358-360.)

So that we have this situation: The "Argyll", when heading almost in a direct course for the "Gualala", while the latter was steering S. E., swung to port; the "Gualala" swung to starboard; they eventually collided at an angle of about thirty degrees from ahead when the "Gualala" was heading at least S. S. W. Now, during the time that the "Argyll" was swinging to port, so as to get into a position to make possible the striking of the "Gualala" thirty degrees from ahead, when the latter was heading S. S. W. it is a physical certainty that the "Argyll's" green light was exposed to the "Gualala". Did the lookout on the "Gualala" see it? *Not for a moment!*

We have his own admission of his failure, in these words:

"MR. WALL. *Did you see any green light at any time?*

A. *No, never noticed any green light at all.*

\* \* \* \* \*

Q. *You could not see her green light at any time?*

A. *I did not notice her green light at any time.*



Q. *Did you ever notice her green light at all?*

A. *No, I never noticed it''* (Ap. 358-360).

Here, then, is this court holding that the collision occurred under circumstances which necessitated the exposure for a considerable period of the "Argyll's" green light to the "Gualala", because she could not have moved from nearly straight ahead when the "Gualala" was steering S. E. to thirty degrees from ahead when the "Gualala" was heading S. S. W., without showing such green light, *and yet at no time did the lookout see the "Argyll's" green light. That certainly establishes beyond all question that the lookout of the "Gualala" was inefficient, for he failed conspicuously to see what he ought to have seen, and what this court necessarily holds must have been visible to him.*

*The Colorado*, 91 U. S. 692, 699;

*The New York*, 175 U. S. 187.

If the lookout had seen the green light and reported it to the bridge, and the wrongful change in course by the "Argyll" had thus been noted and acted upon by the "Gualala", as the rule of prudent navigation would have required, *no one can say that the collision might not have been avoided.*

That this court is fully appreciative of the effect of a defective lookout is shown by its quotation from *The Colorado*, 91 U. S. 692, 699, in condemning the "Argyll". But if the "Argyll's" bridge officer was so negligent *in not observing the momentary change of lights* on the "Gualala", and if the lookout of the "Argyll" was likewise so derelict *in not reporting both lights* of the



“Gualala” together, as to merit the condemnation of the “Argyll”, why was not the “Gualala’s” lookout equally negligent *in not seeing and reporting that which this court holds was necessarily in view,—the “Argyll’s” green light?* If the former were negligent in the navigation of the “Argyll”, the latter was likewise at fault in the navigation of the “Gualala”! How can any distinction be made between the effects of the two, so as to say that if the “Argyll’s” green light had been seen and reported by the “Gualala’s” lookout, still the collision would have occurred? *There are no facts presented by any of the witnesses to support such a conclusion.*

By every test, the lookout was defective.

This court said in its opinion:

“The failure of officers whose duties are to keep a lookout to see what they ought to have seen, or to hear what they ought to have heard, where casualty results, is a grievous fault for which the vessel will be rendered liable.”

We respectfully submit that no grounds exist for exempting the “Gualala” from the application of that rule in view of such unmistakable fault of her lookout.

**B. THE “GUALALA’S” MATE WAS NEGLIGENT IN NOT OBSERVING THE “ARGYLL’S” GREEN LIGHT BEFORE IT WAS TWO POINTS ON HIS PORT BOW WHEN THE “GUALALA” WAS HEADING S. S. W.**

The evidence equally establishes in the same particular, the defective watch kept by the mate, Gibbs, on the “Gualala”. This court says that the “Gualala’s” view

of the situation is the true one; that the "Argyll" was heading almost in a direct course for the "Gualala"; that as the "Gualala" continued to starboard, the "Argyll" changed to port, as she was directed to do, and probably swung further in that direction than the officer on the bridge was aware of. Gibbs says that the "Gualala" was heading S. E. when he saw the "Argyll" (Ap. 262, 280-282); that the "Gualala's" course was changed to starboard, and she was heading S. S. W. *when the "Argyll's" green light was first seen, and that it was then bearing two points on his port bow* (Ap. 265, 290), whereupon, he reversed full speed astern (Ap. 290).

It was a physical impossibility, as we believe will be readily admitted, for the "Argyll" to have altered her course from "almost in a direct course for the 'Gualala'," when the latter was heading S. E., to a position two points on the "Gualala's" port bow, when the "Gualala" was heading S. S. W., *without the "Argyll" exposing her green light to the "Gualala" in making such change. This fact is indisputable for it is capable of a physical demonstration; yet Gibbs saw no green light until it was two opints on his port bow, when the "Gualala" was heading S. S. W.* He thus failed conspicuously to see what the court holds must have been visible. This court held the "Argyll's" bridge officer negligent because he did not see the "Gualala's" *immediate* change in course, both lights together. And yet, the court has made no attempt to distinguish between the two, and has made no reference to this failure of Gibbs.

When Gibbs saw the "Argyll's" green light two points on his port bow, he says he reversed full speed astern, but his vessel still had headway at the time of the collision. Had the lookout reported, or had Gibbs seen, the green light when, on the court's own statement of the collision, it must have first come into view, and had the "Gualala's" danger signal then been blown and her engines reversed and three whistles given indicating that fact, who can say that the collision could not have been prevented? *No one! Positively no one!*

Gibbs' failure to see the green light when it must have first come into view, establishes to a demonstration a defective watch of the most culpable character.

**C. THE "GUALALA'S" LOOKOUT WAS NEGLIGENT IN NOT OBSERVING AND REPORTING THE CONVERGING COURSE OF THE "ARGYLL", AND THE MATE, IN NOT BLOWING THE DANGER SIGNAL AND STOPPING THE "GUALALA" ON OBSERVING THE CONVERGING COURSES OF THE TWO VESSELS.**

This court said in its opinion:

*"It is strange and inexplicable that the Argyll did not discover very much sooner than it did that its course was converging upon that of the Gualala, not diverging from it, starboard to starboard, and at the same time that it should have assented to a signal to pass to port. There was a serious inattention to what ought to have been sooner observed, and if it had been sooner observed, we cannot doubt that the collision would have been avoided. (Italics ours.)"*

What about what the "Gualala's" lookout and first officer should have observed as to the converging

courses? *The converging of the "Argyll's" course was as clearly discernible to the "Gualala" as to the "Argyll", and even more so for the "Argyll" carried* **lookout's** *range lights and the "Gualala" did not. Did the look-* **ance.** *out perform his duty by reporting it? No! Not a word did he report, although he says that he saw the change. If he had, and Gibbs had thus had his attention called to the fact that the "Argyll" was changing her course contrary to the passing signals, and had Gibbs acted as prudent navigation would have required, for he must then have known that a collision was impending, he would have blown the danger signal and stopped. But this noted change in course was not reported by the lookout. His own dereliction thus stands confessed, and yet this court condemned the "Argyll" because such converging course was not sooner discovered. On what ground is the fault of the "Gualala's" lookout to be excused? We frankly know of no reason for distinguishing the fault of the "Gualala" from that of the "Argyll" in this regard.*

**Mate's** Furthermore, is it rational to believe that the **igence.** "Argyll" could have swung on a converging course from a position right ahead of the "Gualala", when the latter was steering S. E., to a position two points on the "Gualala's" port bow when she was heading S. S. W., *without the mate of the "Gualala" observing the change long before the "Argyll", more than twice as large as the "Gualala", reached the position where Gibbs says she was when he reversed?* Certainly it is not, and even Gibbs does not so contend. He admits that he saw the wrongful change in the "Argyll's" course long before

he reversed, i. e., before he saw the "Argyll's" green light two points on his port bow. He testified:

"Q. In which direction did these range lights change, if you know, as to whether the 'Argyll' was coming upon one course or another?

A. Well, it did not look to me as though she had changed her course, but it appeared that she was not porting her helm at that time; it looked to me as if she had not ported her helm; *it looked to me as though she was coming to starboard*" (Ap. 262).

\* \* \* \* \*

"Q. From the lights upon the 'Argyll' in your position what, if any, change did the 'Argyll' make in her course from the time you first saw the range lights until the collision?

A. *Well, the way it looked to me, the 'Argyll' put her helm hard a'starboard.*

Q. When?

A. *Well, when she answered this one whistle.*

Q. Then what change did she make in her course after that, if she made any?

A. Then she put her helm hard a'port; and the way I think that happened was this, that the third mate answered that——" (Ap. 264-5).

\* \* \* \* \*

"Mr. LILLICK. Q. You can state, Mr. Gibbs, what you saw her do and from those lights what she did do.

A. *Well, it appeared to me that when I blowed that one whistle she was swinging to starboard.*

Q. Could you tell whether she had commenced to swing to starboard before you blew that one whistle?

A. No, I think she was on her course at that time.

Q. When did she commence to swing to starboard, if she did?



A. *Shortly after I blew that one blast of the whistle I noticed her range light begin to change, and that is why I ordered the man to put his helm hard a'port'* (Ap. 265-6).

\* \* \* \* \*

“Q. After you blew your one whistle you ported your helm, and she continued to swing on that port helm?

A. Yes.

Q. You say the ‘Argyll’ answered with one whistle?

A. One whistle.

Q. What did you do next?

A. *Well, I seen the ‘Argyll’s’ range lights changing.*

Q. The range lights changing?

A. *Yes, and I told my man to put his helm to hard a'port.*

Q. How were they changing? How could you tell the range lights were changing?

A. Well, they appeared to me they were changing.

Q. And it was by those range lights that you were judging that she was swinging?

A. Yes.

Q. Which way did you think she was swinging?

A. *Well, I thought she was swinging to—I thought she was swinging a little to starboard.*

Q. Then you at that time ordered your helm to hard a'port?

A. *I still seen that range light, and I ordered him to put his helm hard a'port.*

Q. From that time, from the swinging of the range lights you thought the ‘Argyll’ was swinging to starboard?

A. I thought she was swinging a little to starboard; it appeared that way to me.

Note.—When Gibbs said that the “Argyll” swung to starboard, he meant that she swung to port under a starboard helm.



Q. *How long before the collision was it that you put your helm hard a'port?*

A. *It was about a minute and a half.*

Q. *How long was that after you had first put your helm to port?*

A. *It was about half a minute'' (Ap. 289-290).*

Gibbs then knew that the "Argyll" was turning towards him on a converging course; indeed, he specifically says that *it was the change in the "Argyll's" course which caused him to order his helm hard a'port.* This was a minute and a half before the collision! *Did he blow the danger signal or stop and reverse on observing the "Argyll's" mistake. He did not, but kept the "Gualala" on at full speed, and the next he saw was the "Argyll's" green light two points on his port bow after the "Gualala" had swung six points (67½ degrees—¾ of a right angle) in her course from S. E. to S. S. W.* Then, for the first time, Gibbs reversed, but even in those circumstances did not blow either a danger signal, or the three whistles required by the statutory rule. *If this was not negligent navigation; how can it be characterized?* The court recognized this in its opinion when it said that "the 'Gualala' is perhaps subject to criticism that she did not sooner stop and reverse". He, Gibbs, did stop and reverse on seeing the green light. Then, when the court said that the "Gualala" was subject to criticism that she did not sooner stop and reverse, the court could only have had in mind that Gibbs saw the "Argyll's" error when Gibbs said he did, a minute and a half before the collision when he hard a'ported.

The court held that it was strange and inexplicable that the "Argyll" did not discover much sooner than

she did that her course was converging upon that of the "Gualala". But here is the "Gualala's" mate *confessing that he did observe the converging course, and admitting that he did not then stop his ship or give the danger signal.* This court said that "if it (the converging of the 'Argyll's' course upon the 'Gualala's') had been sooner observed (by the 'Argyll'), we cannot doubt that the collision would have been avoided". Is it now going to hold that that *which was not observed* and not acted upon by the "Argyll", but *which was observed* and not acted upon by the "Gualala", condemns the former, and does not condemn the latter? We cannot believe so, for *it is impossible to say that if Gibbs had reversed on seeing the "Argyll's" wrongful change of course, the collision could not have been avoided.*

The collision occurred on a clear night, under conditions by which, according to the view taken by the court, the "Argyll", a vessel more than twice as large as the "Gualala" and slow and unwieldy in her movements, moved from a position nearly ahead of the "Gualala", when the latter was steering S. E., to a position 30 degrees from ahead, while the "Gualala", proceeding at full speed, had changed her course to S. S. W. This required the larger and more cumbersome vessel to travel a greater distance than did the smaller and quicker turning "Gualala", while the latter was altering her heading six points. The maneuver must have brought the green light of the "Argyll" into plain view long before she was two points on the "Gualala's" port bow when heading S. S. W., and must have shown, as Gibbs admits that it did to him, that the

“Argyll” was turning against the exchanged passing whistles on a converging course, which, if continued, made the danger of collision imminent. Yet, in these circumstances, the lookout of the “Gualala” never saw the “Argyll’s” green light, and never observed and reported the converging course. The mate never saw the green light of the “Argyll” until it was two points on the “Gualala’s” port bow when she had changed her course to S. S. W. from S. E.; the mate saw the error of the “Argyll” and her swinging to port towards the “Gualala” on a converging course, and not to starboard away from the “Gualala” on a diverging course, as the exchanged passing signals required, but did not stop his vessel or blow the danger signal as the rules required. Confessedly, then, the “Gualala” was guilty of contributory fault of the clearest character, and merits the application of the rules laid down by the Supreme Court in *The Colorado*, *The New York*, and *The Oregon*, cited by this court.

We cannot, perhaps, in the view which this court has taken of the maneuvers of the vessels which precipitated the collision, more pertinently point out the errors in navigation than to quote the following excerpt from the recent case of

*Yang-Tsze Ins. Ass’n et al. v. Furness, Withy & Co. et al.*, 215 Fed. 859, 864:

“The loss of property for which a recovery is sought was due to a collision on the high seas, in broad daylight and in clear weather, and with no other vessels about to embarrass or interfere with navigation. The two vessels involved were steamers, and therefore could be maneuvered more easily than any other kind of vessels. They were in plain

sight of each other when miles apart. They nevertheless came into collision with such force that one of them sank in a few hours, carrying down with her the entire cargo. It is difficult to see how it all happened unless both vessels were in fault and failed to exercise reasonable care. Plain common sense constrains one to such a conclusion. To exonerate either of them under such conditions can be justified only if upon the closest scrutiny of the navigation of each vessel it can be discovered that one of them was free from all culpable blame."

The closest scrutiny does not show that the "Gualala" was free from all culpable blame, but, on the contrary, her fault is clear.

We respectfully submit, therefore, that for the reasons specified a rehearing should be granted.

Dated, San Francisco,

June 15, 1915.

EDWARD J. McCUTCHEN,

IRA A. CAMPBELL,

McCUTCHEN, OLNEY & WILLARD,

*Proctors for Appellant  
and Petitioner.*

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#### CERTIFICATE OF COUNSEL.

I hereby certify that I am of counsel for appellant and petitioner in the above entitled cause and that in my judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact, and that said petition is not interposed for delay.

IRA A. CAMPBELL,

*Of Counsel for Appellant  
and Petitioner.*